UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and BENNETT T. MARTIN,	)	
	)	FILED: November 6, 2001
Defendants.	)	

UNITED STATES' BRIEF IN SUPPORT OF MOTION *IN LIMINE*
TO EXCLUDE ARGUMENTS DESIGNED TO NULLIFY THE JURY

I
INTRODUCTION

The United States respectfully moves this Court to preclude the defendants from arguing or otherwise presenting evidence or pursuing lines of inquiry designed to elicit jury nullification. The defendants may project a jury nullification argument in the following ways, among others: (1) alluding to the potential penalties faced by the defendants; (2) challenging the propriety, wisdom or fairness of the government's immunity, non-prosecution or plea agreement decisions as to government witnesses and their co-conspirator companies; or (3) alluding to the impact or effect of a conviction upon defendant Bennett T. Martin's family. Such evidence or argument is improper and should be excluded from being admitted or presented at trial.

II
JURY NULLIFICATION

It is clearly improper for the defendants to suggest to the jury that the jury should acquit for reasons beyond the facts and the law. In 1895, the United States Supreme Court decided a case, Sparf & Hansen v. United States, 156 U.S. 51 (1895), that is still universally regarded as

the decisive case disapproving of jury nullification. In Sparf, the defendants, convicted of murder, sought review on the theory that the trial judge had unconstitutionally usurped the jury's province by instructing it that, although the jury had the power to bring in a verdict of manslaughter, any verdict other than a conviction for murder, the crime charged, or a total acquittal would violate its oaths and duties. Id. at 59-63. The Supreme Court rejected their argument, holding that, although a jury has an absolute power to ignore a judge's directions, it has no such right and to do so is wrongful. Id. at 101-02. Therefore, though a judge cannot usurp the jury's raw power to nullify a verdict by, for example, directing a conviction or vacating an acquittal, the Supreme Court in Sparf held that it is proper for a judge to instruct a jury to take the law only from the judge and not find it on its own. Id. at 102-03; 105-06. As the Supreme Court explained: "Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves." Id.

Although some have since argued for the "right" of a jury to an instruction informing the jury of their nullification power, no federal circuit court has ruled in favor of a nullification instruction. Rather, they have all followed the Supreme Court's decision in Sparf and have consistently declared that, although constitutionally unpreventable, nullification is a wrongful action. See, e.g., United States v. Marchese, 438 F.2d 452, 455 (2d Cir. 1971) (holding court did not error in instruction to jury that it is bound to accept law as given by court).

Thus, the law is plain that it is improper for the defendants to suggest in any way that the jury should acquit them even if it finds that the United States has met its burden of proof. See United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) ("[A]n unreasonable jury verdict . . . is

lawless, and the defendant has no right to invite the jury to act lawlessly. Jury nullification . . . is not a right, either of the jury or of the defendant") (citing United States v. Kerley, 838 F.2d 932, 938 (7th Cir. 1988)); Scarpa v. Dubois, 38 F.3d 1, 11 (1st Cir. 1994) ("Defense counsel may not press arguments for jury nullification in criminal cases"); United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983) ("Appellant's jury nullification argument would have encouraged the jurors to ignore the [C]ourt's instruction and apply the law at their caprice. While we recognized that a jury may render a verdict at odds with the evidence or the law, neither the [C]ourt nor counsel should encourage jurors to violate their oath."); United States v. Edwards, 101 F.3d 17, 19 (2d Cir. 1996) (holding that good motives do not nullify a defendant's violation of the law and that a jury should not be encouraged to consider such arguments).

Courts can and should prevent defense counsel from pressing arguments for jury nullification in criminal cases. See United States v. Young, 470 U.S. 1, 7-10 (1985) (holding that court has duty to prevent counsel from making improper arguments to the jury, including those that are designed to divert the jury from its duty to decide the case on the facts and the law); United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983) (affirming district court's refusal to encourage jury to consider anything other than the facts and law); United States v. Burkhardt, 501 F.2d 993, 996-97 (6th Cir. 1974) (holding that court should instruct jury to ignore everything but the facts and the law); Scarpa v. DuBois, 38 F.3d 1, 11 (1st Cir. 1994); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("[N]either the court nor counsel should encourage jurors to exercise [nullification] power. A trial judge, therefore, may block defense attorneys' attempts to serenade a jury with the siren song of nullification." (citations omitted)); United States v. Muse, 83 F.3d 672, 677 (4th Cir. 1996) (explaining that trial court

should prevent defense counsel from presenting nullification arguments to the jury); United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983) (holding that a district court has duty to try to ensure that the jury reaches a verdict based upon the evidence and the law). It is proper to file a motion in limine to exclude such argument from the trial. See United States v. Young, 20 F.3d 758, 765 (7th Cir. 1994) (affirming trial court's granting of government's motion in limine to exclude jury nullification arguments); United States v. Sloan, 704 F. Supp. 880, 884 (N.D. Ind. 1989) (granting government's motion in limine to preclude jury nullification arguments).

Defense counsel should focus the jury's attention on the facts and not try to confuse it with appeals based on emotion, sympathy or other similar consideration.

III

EVIDENCE OF AND ARGUMENT ABOUT PENALTIES FACED BY DEFENDANTS

The United States moves this Court to preclude the defendants Bennett T. Martin and Martin News Agency, Inc. from introducing evidence, making an argument, or otherwise mentioning the potential penalties they face if convicted. The potential penalties faced by the defendants are irrelevant to the jury's determination of the defendants' guilt or innocence. See Fed. R. Evid. 401; Rogers v. United States, 422 U.S. 35, 40 (1975) (jury should reach its verdict without regard to the sentence that might be imposed); United States v. Shannon, 981 F.2d 759, 761 (5th Cir. 1993) ("The well-established general principle is that a jury has no concern with the consequences of its verdict. . . . This Circuit has long recognized that punishment and sentencing are matters entrusted exclusively to the trial judge.") (quoting and citing Rogers at 40); Pattern Jury Instr., Crim., 5th Cir., Instruction No. 1.20 (1997). While the law prohibiting such references to potential penalties is especially clear, the Court should be vigilant to questions of government witnesses designed to elicit answers, which would properly bear upon their

credibility, about the potential punishment maximums the witnesses face or have faced. These answers should not be used as a basis for argument to the jury that it should consider those potential punishments when determining the guilt or innocence of the defendants.

IV
EVIDENCE AND ARGUMENT RELATING TO THE UNITED STATES' DECISION TO IMMUNIZE OR NOT TO PROSECUTE CERTAIN CO-CONSPIRATORS

The United States moves this Court to exclude any evidence or argument by the defendants regarding the propriety, wisdom or fairness of the government's immunity decisions, or the government's decisions to prosecute or not prosecute certain witnesses as the result of plea agreements reached with their co-conspirator companies.

At trial, the United States anticipates that it will call certain witnesses who will testify pursuant to plea agreements or other agreements in which the United States has made certain non-prosecution commitments in exchange for the witnesses' cooperation. Some of these witnesses participated in the charged conspiracy to allocate territories and customers in Dallas, Fort Worth and the surrounding areas of Texas. They will testify about their own actions and observations and about the defendants' participation in the charged conspiracy. The United States believes that defense counsel may attempt to introduce evidence and/or argue to the jury that it was unfair for the United States to immunize or make non-prosecution commitments to these individuals, yet indict and prosecute the defendants for engaging in basically the same

conduct.[1] Or, though not true, defense counsel may suggest that the jury find the defendants not guilty because other conspirators, who have chosen to plead guilty or cooperate, were more culpable than either Bennett T. Martin or Martin News or that the defendants played a lesser role in the conspiracy. In doing so, the defendants will be asking the jury to acquit them on grounds other than the facts and the law. That type of argument is improper and should be excluded. Such evidence or argument is irrelevant to the issue of guilt or innocence of the defendants and is outside the province of the jury.

It is well-settled that decisions of whether or not to prosecute or who or who not to prosecute are matters solely within the United States' broad discretion. Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute.") (citing United States v. Goodwin, 457 U.S. 368, 380, n. 11 (1982); Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980)). The decision to grant statutory immunity to a witness is also within the sole discretion of the prosecution. United States v. Schweihs, 971 F.2d 1302, 1315 (7th Cir. 1992) (stating that Congress conferred the power to grant immunity to a witness exclusively on the executive branch with 18 U.S.C. §6003 (1989); United States v. Hooks, 848 F.2d 785, 798-99 (7th Cir. 1988) ("[S]ection [§6003] provides considerable discretion to the prosecutor, who is permitted to request immunity when 'in his

[1] This motion is not intended to prohibit defense counsel from inquiring of the witnesses about plea agreements their corporate employer's reached with the United States, as such inquiry would likely bear upon the witnesses' credibility. In fact, in anticipation of the defendants' desire to do just that, the United States will seek to admit the guilty pleas and discuss those agreements reached between the United States and the defendants' corporate co-conspirator. However, to turn those legitimate questions into an attack on the United States' motivation or the relative fairness to the defendants of the United States' decision to enter into such agreements is improper and is what this Motion seeks to prohibit.

judgment' it is 'necessary to the public interest.' It is the duty of the prosecutor to balance 'the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law.'") (quoting In re Daley, 549 F.2d 469, 478-79 (7th Cir. 1977), cert. denied, 434 U.S. 829 (1977)); United States v. Frans, 697 F.2d 188, 191 (7th Cir. 1983), cert. denied, 464 U.S. 828 (1983). The propriety, wisdom or fairness of the United States' decisions in this regard are not proper matters for consideration by the jury and the Court should reject any attempt by the defendants to raise those issues at trial. See, e.g., United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978) ("A defendant has no standing to contest the propriety of the grant of immunity to a witness."), aff'd. 445 U.S. 40 (1979).

Therefore, a defendant has no right to argue to the jury the propriety of any prosecutorial decision, including immunity decisions. See, e.g., United States v. Oberle, 136 F.3d 1414, 1422-23 (10th Cir. 1998) (affirming trial court's instruction that the jury should not concern itself with the guilt of anyone other than the defendant). This issue was faced squarely by the Second Circuit in United States v. Cheung Kin Ping, 555 F.2d 1069, 1073-74 (2d Cir. 1977). In Cheung defense counsel argued to the jury that it should consider the "public policy implications of the [g]overnment's favorable treatment of [the] cooperating witness" and by its verdict of not guilty could send a message to the government that it did not like the "deals" it had made with the cooperating witness. Id. at 1073. The Cheung Court approved the trial court's charge in which the court "instructed the jury that law enforcement policy was not its concern, and [the court] admonished the jury to focus its attention on the real issue, namely, whether the [G]overnment had proved the facts alleged in the indictment beyond a reasonable doubt." Id. At 1073. The

court found that the charge was "well chosen, accurate and appropriate" since defense counsel had urged acquittal "on the basis of extraneous public policy considerations." Id. at 1073-74. The Cheung Court concluded, "[t]he trial court does indeed have the right to 'spear a red herring' . . ." Id. at 1074.

Also instructive is the trial court's decision in United States v. Renfroe, 634 F. Supp. 1536, 1538-39 (W.D. Pa. 1986), aff'd 806 F.2d 255 (3d Cir. 1986). Defense counsel in Renfroe was found in contempt for repeatedly violating the court's order that counsel were to refrain from suggesting to the jury that they "should express in their verdict their attitude about the propriety or wisdom of the Government's policy in granting immunity to some witnesses and choosing to prosecute others." Id. at 1538. The Renfroe Court explained that "unless the [C]ourt intervened, the jury's deliberations would be diverted from consideration of the issues properly before it to matters quite irrelevant, and that it would be invited to render a verdict on wholly inappropriate grounds." Id. at 1537.

Accordingly, evidence and argument related to the fairness or wisdom of the government's prosecutorial decisions concerning immunity, non-prosecution agreements or plea agreements with corporate co-conspirators should be barred.

V
EFFECT OF CONVICTION ON FAMILY

Defendant Bennett T. Martin should not be permitted to draw attention to his family, including his family's need for support, either financial or emotional, and the effect of a conviction upon his family. This kind of information is irrelevant and amounts to nothing more than an appeal to the sympathy of the jury. See, e.g., United States v. Ramirez, 482 F.2d 807, 816 (2d Cir. 1973); United States v. D'Arco, 1991 WL 264504 at *4 (N.D. Ill. 1991) (holding

that "no testimony or argument will be allowed regarding the impact of the trial or possible conviction upon a family member"); United States v. Shields, 1991 WL 236492 at *4 (N.D. Ill. 1991) (granting motion in limine precluding "any testimony regarding the possible impact which a conviction might have upon any family member"). Personal or familial consequences of trial or conviction should play no part in the jury's deliberations on whether or not the defendant Bennett T. Martin is guilty of the crime charged in the Indictment.

VI
CONCLUSION

For the foregoing reasons the United States respectfully requests this Court to grant this Motion in limine in its entirety.

Respectfully submitted,

"/s/"

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